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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

MICHAEL ZELENY.

Plaintiff,

VS.

GAVIN NEWSOM, *et al.*,

Defendants.

Case No. CV 17-7357 JCS

Assigned to:
The Honorable Richard G. Seeborg

Discovery Matters: The Honorable Thomas S. Hixson

**PLAINTIFF MICHAEL ZELENY'S
OPPOSITION TO MOTION FOR
SUMMARY JUDGMENT OF THE CITY
OF MENLO PARK AND POLICE CHIEF
DAVE BERTINI**

[Filed concurrently:

1. Supplemental Declaration of Michael Zeleny;
 2. Supplemental Declaration of Damion Robinson;
 3. Evidentiary Objections]

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Plaintiff Michael Zeleny (“Zeleny”) opposes the Motion for Summary Judgment of the City of Menlo Park (the “City”) and Chief Dave Bertini (“Bertini”; collectively the “City Defendants”).

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1 **I. INTRODUCTION**

2 The City Defendants' Motion should be denied. This Motion and Zeleny's cross-motion
 3 turn on a single issue: whether the City's *administrative processes* for issuing Special Events
 4 Permits ("SEP") and film permits were constitutional under the First Amendment. As a matter of
 5 well-defined law, they were not. The City Defendants' motion does not even discuss the leading
 6 case on permitting processes, *Epona v. County of Ventura*, 876 F.3d 1214 (9th Cir. 2017). The
 7 reason is clear. The City's processes were patently deficient.

8 Rather than address the applicable legal standard, the City tries to justify the merits of its
 9 permitting decisions by ridiculing the content of Zeleny's protected First Amendment protest
 10 activity. The First Amendment, however, is not a popularity contest. The fundamental value of the
 11 First Amendment is precisely the opposite. Popular speech is easy. It is *unpopular* speech that
 12 needs to be protected – including expression that the majority of Americans and many
 13 municipalities might find ridiculous or disturbing. *E.g., Hustler Magazine v. Falwell*, 485 U.S. 46
 14 (1988) (parody portraying minister "as having engaged in a drunken incestuous rendezvous with his
 15 mother in an outhouse"); *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *R.A.V. v. City of St.
 16 Paul*, 505 U.S. 377 (1992) (cross burning).

17 The City Defendants have played fast and loose with Zeleny's fundamental constitutional
 18 rights for more than a decade. They have entangled Zeleny in a years-long permitting process,
 19 which they made up as they went along. They continue to do so even in this very motion, offering a
 20 host of irrelevant, last-minute excuses, which they failed to raise in the many years before the
 21 current motions were filed. They are continuing to make up the rules. Enough is enough.

22 The Court's role on a First Amendment challenge is well-defined. The First Amendment is
 23 "[p]remised on a mistrust of governmental power." *Citizens United v. FEC*, 558 U.S. 310, 340
 24 (2010). The Court must carefully scrutinize the City's process to ensure that it contains clear,
 25 objective standards and procedural safeguards so that applicants' rights are not relegated to the
 26 unbridled discretion of bureaucrats or indefinite delay. The City's procedures here fail this test.

27 ***First***, the City's film permitting process is unconstitutional. Its permitting decisions are
 28 "completely discretionary," devoid of objective criteria. Nor are there any time limits for rendering

1 a decision—the City has stalled multiple applications for years. The City’s newest theory, raised
 2 for the first time in its Motion, is that the process for *construction encroachments* governs film
 3 permits, but this theory contradicts the City’s discovery responses and testimony.

4 ***Second***, the City’s Special Event process also fails under *Epona*. The City’s “policy” lacks
 5 any objective criteria and confers unbridled discretion on the City to make up new criteria case-by-
 6 case—as it did with Zeleny’s application. The City also has unbridled discretion to decide whether
 7 an event is “special”. Again, there is no time limit on processing an application. The City
 8 Defendants assume their conclusion by asserting that the SEP process does not “substantially reach
 9 or regulate constitutional activity,” but the very examples they cite of events requiring permits, *i.e.*,
 10 “concerts” and outdoor “movie nights” – involve core forms of expression and refute their position.

11 ***Third***, the City Defendants ignore binding precedent in arguing that Zeleny’s as-applied
 12 challenge to the film permit process is unripe. A municipality cannot have a “pocket veto” on
 13 permitting decisions and avoid review by stalling in perpetuity. Nor is a plaintiff required to wait
 14 *for years* while the City dawdles in an unconstitutional process.

15 ***Fourth***, the City’s last-minute argument—raised over two years into this case—that it does
 16 not own the median where Zeleny first sought to stage his events is irrelevant and misleading. The
 17 median is within City limits and subject to the City’s criminal-law authority. Far from disclaiming
 18 such authority, the City elsewhere argues that its authorization is required. Moreover, the City has
 19 failed to submit admissible evidence showing that someone else (Caltrans) owns the median strip.

20 ***Fifth***, the City’s “time, place and manner reasons” for its denials miss the point. They do
 21 not go to the validity of the ***administrative process***. As *Epona* recognizes, a municipality can
 22 always come up with justifications in hindsight. The City was required to define objective criteria
 23 up front. The City failed to do so, but even if it had, it failed to support its “time, place and manner
 24 reasons” with any admissible evidence—just as it failed to do in the permitting process itself.

25 ***Sixth***, and finally, Zeleny is entitled to relief against Bertini, who was directly involved in
 26 the unconstitutional process. Bertini’s retirement does not moot Zeleny’s claims against him.

27 The City’s permitting processes are constitutionally impermissible. Summary judgment
 28 should be entered against the City Defendants and in Zeleny’s favor.

1 **II. FACTUAL BACKGROUND**

2 **A. Zeleny's First Amendment Activities**

3 Since 2009, Zeleny has put on and wants to resume putting on entertainment/protest events
 4 in Menlo Park, outside the headquarters of New Enterprise Associates ("NEA"). He recorded prior
 5 events as part of an online production and documentary. Zeleny Decl. ¶ 34.¹ Zeleny has always
 6 been willing to conduct his events on the median, either side of the street, or the sidewalk, and to
 7 comply with all reasonable time, place, and manner requirements – if the City would just bother to
 8 tell him what they are. Zeleny Supp. Decl. ¶ 8.

9 Zeleny's proposed events bear all of the hallmarks of core First Amendment activity. He
 10 intends to present a video and images of his activism—*i.e.*, NEA's ongoing corporate sponsorship
 11 of a morally disqualified Silicon Valley executive. He intends to use placards and hand out flyers;
 12 to speak with passersby about his message; and to film the events and reactions to them. He also
 13 intends to lawfully carry firearms, per Penal Code §§ 26375 and 26405(r). Zeleny Supp. Decl. ¶ 2.

14 **B. The City's Ongoing Efforts to Stop Zeleny's Protests.**

15 Zeleny engaged in similar activities at the same location more than 20 times through 2012
 16 without incident. Zeleny Supp. Decl. ¶ 3. The Menlo Park Police Department ("MPPD")
 17 constantly monitored his activities. Far from finding a crime or threat to safety, they went out of
 18 their way to note how courteous and cooperative he was. Zeleny Decl. ¶¶ 20-22; Robinson Decl.,
 19 Ex. H; Robinson Supp. Decl., Ex. 1 at 146-47, 186-88, 191, 203; *id.*, Ex. 2 at 290.

20 Nonetheless, the City worked with the target of Zeleny's protests, NEA, to find a "firm
 21 solution" to end his protests. Robinson Decl., Exs. 1, J, & K at MP-93; Robinson Supp. Decl., Ex. 1
 22 at 150-51, 161-62, 190, 211-12. In 2012, this took the form of having Zeleny falsely charged with
 23 possession of a "concealed" weapon. Zeleny Decl. ¶¶ 24-30 & Ex. 2 at pp. 15-16, Ex. 4. Zeleny's
 24 protests paused until 2014, when he was acquitted. Zeleny Supp. Decl. ¶ 4.

25 ¹ Because the issues on this motion and Zeleny's motion overlap, Zeleny relies on the declarations submitted
 26 in support of his motion. Zeleny's prior declaration [Dkt. No. 162-2] is referred to as "Zeleny Decl." and his
 27 current supplemental declaration as "Zeleny Supp. Decl." The prior declaration of Damion Robinson [Dkt.
 28 No. 162-1] is referred to as "Robinson Decl." and the supplemental declaration as "Robinson Supp. Decl."
 Page references to documents produced by the City are by bates page in the format "MP-#####".

1 **C. California's Entertainment Exemption to Its Open Carry Ban.**

2 While Zeleny's prosecution was ongoing, California enacted its "open carry" ban, which
 3 prohibits citizens from carrying a firearm virtually anywhere in the state. Cal. Pen. Code §§ 23650,
 4 26500. Among other exemptions, the "open carry" ban exempts "authorized participants" in film,
 5 television and video productions, and entertainment events. Cal. Pen. Code §§ 26357, 26405(r).

6 "The City interprets the exemptions as requiring its authorization [either through an SEP or
 7 a film permit] since the activities would be occurring on public property." Mot. at p. 17. Zeleny is
 8 subject to arrest if he has no permit. Robinson Supp. Decl., Ex. 1 at 182-183. Although Zeleny
 9 disagrees with this interpretation, he sought a permit to avoid prosecution. Zeleny Supp. Decl. ¶ 6.

10 **D. The City's Defective Permitting Processes**

11 Zeleny applied for a Special Events permit and for a film permit. The City stymied both.

12 **1. The SEP Process**

13 The City's entire policy on SEPs is in a short form, a three-page "FAQ," a flowchart, and a
 14 website with the same information. Robinson Decl., Exs. R, U; Robinson Supp. Decl., Ex. 1 at 64.

15 City policy defines a "special event," requiring a permit, as any event meeting "one or more
 16 of these criteria": (a) attendance of over 150; (b) use of any street, sidewalk, or right of way; (c)
 17 street or lane closures; (d) traffic impact; (e) exceeds noise ordinance; (b) parking needs exceeding
 18 capacity; (f) generating a crowd sufficient to disrupt pedestrian or vehicular traffic; (g) "Community
 19 Events"; (h) events lasting more than one day; or (i) requiring "Police regulation, monitoring, or
 20 control." Robinson Decl., Ex. R. The City now asserts that "a special event is a "community-
 21 oriented event" or "community-related activit[y] of a social and/or recreational nature." Mot. at p.
 22 3, 20. This wholly subjective definition appears nowhere in its written policy.

23 Even if an event meets the stated definition, City staff have discretion to determine whether
 24 it is a "special" event warranting a permit. Robinson Supp. Decl., Ex. 1 at 20-21; *id.*, Ex. 2 at 371-
 25 72. Despite admitting that Zeleny's event qualifies, *id.*, Ex. 1 at 107-110, the City denied him a
 26 permit for over two years based on its decision that his event was not a "special event" as defined
 27 by the City. Robinson Decl., Ex. W, Zeleny Decl., Ex. 8 at pp. 10, 20, 33, 41.

28 "Determination of the approval or denial of any application is *at the discretion of the*

1 ***Special Events Permit Committee***" (the "SEP committee"). Robinson Decl., Ex. R at MP-1820;
 2 *see also* Robinson Supp. Decl., Ex. 5 at 126-127. There are no set criteria for issuance or denial.
 3 The City provides a non-exhaustive list in its FAQ:

4 Approval or denial of applications are based upon several factors including:
 5 size (number of people), scale, location, route to be closed, *community*
impact, impact on City services, *past practices/experiences with issued*
permits, *intended use*, non-payment of fees, *poor articulation of event* as
 6 reflected in the application and site map, *etc.*

7 Robinson Decl., Ex. R at MP-1820. Consistent with this non-exhaustive list, staff consider a host of
 8 other, unwritten factors decided case-by-case, depending on the application submitted. Robinson
 9 Supp. Decl., Ex. 1 at 28-29, 33-35, 38-39, 42-43, 45-46, 75, 111-12; *id.*, Ex. 2 at 426; *id.*, Ex. 3 at
 10 104-05, 107, 114-15, 200-05; *id.* Ex. 5 at 117, 125-26. Although the City claims that it only applies
 11 "time, place and manner" factors, it has no guidelines for how to assess them—*e.g.*, size limits, time
 12 limits, or approved locations. *Id.*, Ex. 1 at 41-42, *id.*, Ex. 2 at 241-247.

13 Despite clear legal prohibitions, City staff also considers content of the event. In Zeleny's
 14 case, the City considered his content "important, salient information." *Id.*, Ex. 2 at 476.

15 Finally, the SEP process lacks clear procedures. It has no set time limits. Robinson Supp.
 16 Decl., Ex. 2 at 247, Ex. 3 at 75, 80. The City now claims that the City's Attorney can unilaterally
 17 decide applications—although this nowhere appears in its policy. *Id.*, Ex. 2 at 450-52.

18 **2. The Film Permit Process**

19 The City's entire policy governing film permits is in a two-page handout and a short permit
 20 application. Robinson Decl., Ex. U; Zeleny Decl., Ex. 12. There are no other written or unwritten
 21 policies. Robinson Supp. Decl., Ex. 2 at 481-83.

22 The policy contains no substantive standard for a decision. *See* Robinson Decl., Ex. U.
 23 Film permits are "complete discretionary" with the City. Decl. of Todd Master [Dkt. 160-6], Ex. E
 24 at p. 44; Robinson Supp. Decl., Ex. 2 at 495-96, 514-15; *id.*, Ex. 4 at 41, 156-57. Even if an
 25 applicant complies with all written requirements, the City is not required to issue a permit. *Id.*, Ex.
 26 2 at 483-87, 496, 505-506, 520-21, 529. Applications are decided case-by-case on whatever factors
 27 the City decides to consider. *Id.* Applicants must comply with all "guidance of City supervisory
 28 employees," imposed in their discretion. *Id.* at 487-488, 490; Robinson Decl., Ex. U.

1 There is no time limit for a decision. *Id.*; Robinson Supp. Decl., Ex. 1 at 121, Ex. 2 at 495.

2 **E. Zeleny Applied for an SEP and the City Gave Him the Run-Around.**

3 Zeleny first applied for an SEP on July 10, 2015. Zeleny Decl., Ex. 6. His application was
4 denied at multiple stages of review in a process that took more than two years. *Id.*, Ex. 10.

5 **1. The City Denied Zeleny's Application.**

6 The City did not follow the official SEP process. The SEP committee never considered his
7 application because it was never submitted to them. Robinson Supp. Decl., Ex. 2 at 409; *id.*, Ex. 3
8 at 118-19, 138. Instead, Chief Bertini and City Attorney William McClure (“McClure”) inserted
9 themselves into the process and denied Zeleny’s application despite never deciding an application
10 before. *Id.*, Ex. 1 at 51; Ex. 2 at 256, 371-72, 450-52; Ex. 3 at 39-40, 53-55, 154; *see also* Robinson
11 Decl., Ex. V. Meanwhile, Bertini worked with NEA on a “combined response” to Zeleny.
12 Robinson Decl., Ex. W; Robinson Supp. Decl., Ex. 2 at 406-07.

13 Days after receiving Zeleny’s application, the City secretly denied it. On July 21, 2015,
14 Bertini assured NEA that the City planned to deny Zeleny’s application “predominately [because]
15 this is not a ‘special event’ as defined by the City.” Robinson Decl., Ex. W; Robinson Supp. Decl.,
16 Ex. 6 at MP-297. By August 10, it was “in the process of being denied.” *Id.*, Ex. X at MP309.

17 Having already decided to deny Zeleny’s application, McClure nevertheless peppered
18 Zeleny with questions for “due diligence.” Robinson Supp. Decl., Ex. 6; Zeleny Decl., Ex. 7.
19 McClure back-filled the record for a decision already made, and stalled for two months. *Id.* He
20 then ignored Zeleny’s answers, and declared the application “incomplete.” Zeleny Decl., Ex. 8 at
21 pp. 20-21; Robinson Supp. Decl., Ex. 2 at 413-14, 423-24.

22 McClure announced denial of the application in September 2015. *Id.* He made no reference
23 to or findings on the published criteria, nor was any evidence of impact presented. *Id.* He exercised
24 unbridled discretion to find that Zeleny’s event was not a “special event.” *Id.* He also concluded
25 that “it is illegal to open carry a firearm in the State of California. . . [T]here does not appear to be
26 any logical nexus or legitimate purpose of carrying a firearm.” *Id.*

27 **2. The City Made Up an Appeal Process.**

28 When Zeleny tried to appeal, McClure deemed his appeal a “new application,” and again

1 denied it unilaterally. Zeleny Decl., Ex. 8 at pp. 25-26; Robinson Supp. Decl., Ex. 2 at 449. The
 2 City then stalled Zeleny’s appeal, first so Bertini could urge the California DOJ to revoke Zeleny’s
 3 Entertainment Firearms Permit, and when that failed, to wait out the term of that permit until it
 4 expired. Robinson Decl., Ex. Z. The process took nearly two years.

5 At each stage of appeal, the City gave Zeleny a shifting series of excuses for the denial, none
 6 of which related to the published factors. *See* Zeleny Decl., Ex. 8 at pp. 10, 11, 20-21, 33-34, 49;
 7 Robinson Supp. Decl., Ex. 2 at 467-469. City staff submitted no evidence on the factors, *e.g.*,
 8 traffic surveys, measurements, or evidence of impact. *See generally* Zeleny Decl., Ex. 8 & Ex. 9 at
 9 p. 12; Robinson Supp. Decl., Ex. 5 at 94-97, 103-104. Instead, Bertini, on behalf of City staff,
 10 argued for affirmance of the denial on content-based grounds, claiming that Zeleny’s production
 11 *might be* deemed “obscene as to minors.” Zeleny Decl., Ex. 9 at pp. 6, 8, 9 (“The new reason today
 12 regarding this graphic has to do with the content of the graphic, is that right? That’s correct.”);
 13 Robinson Supp. Decl., Ex. 1 at 136-137, 139, 141-143; *id.*, Ex. 2 at 472-476.

14 **F. Zeleny Applied for a Film Permit and the City Gave Him the Run-Around.**

15 During the SEP appeal, the City suggested Zeleny apply for a film permit instead. *Id.*, Ex. 2
 16 at 481. After the denial, he applied for a film permit in September 2017. Zeleny Supp. Decl. ¶ 9.

17 The City again failed to follow its stated process. The City ignored Zeleny’s application for
 18 a month. *See* Decl. of Nicolas Flegel [Dkt. No. 160-2] Ex. G. Bertini and the City Attorney then
 19 intercepted Zeleny’s application again. Robinson Supp. Decl., Ex. 1 at 121. Bertini took it upon
 20 himself to give “guidance” to City staff responsible for the application, although he is not involved
 21 in the process. Eventually, the City Attorney’s Office took over. Robinson Decl., Exs. AA, BB;
 22 Zeleny Decl., Exs. 11, 13; Robinson Supp. Decl., Ex. 2 at 497-98, 505-506.

23 The City Attorney’s Office then demanded a host of irrelevant and content-based
 24 information having no connection to the official permitting policy. Zeleny Decl., Ex. 13 at MP-
 25 1425 to 1426; Robinson Supp. Decl., Ex. 2 at 513-14. Among other things, they demanded to know
 26 the names of Zeleny’s cast and crew, who supplied his firearms, the serial number of all firearms,
 27 and the relevance of certain elements of his presentation—ostensibly to “analyze public safety
 28 concerns” not in any policy. Flegel Decl., Ex. J, K. These questions were at the behest of the

1 MPPD, so that it could investigate participants. Robinson Decl., Ex. 4 at 131, 154-155.

2 None of this information has been required of other applications. For example, while the
 3 City was “reviewing” Zeleny’s application, the producers of HBO show “Billions” obtained a
 4 permit to drive a 30-foot camera rig down the same stretch of Sand Hill Road. The City required
 5 none of this type of information and issued a permit *within days*. Robinson Decl., Ex. Y; *see also*
 6 Robinson Supp. Decl., Ex. 7 (application approved in six days for filming from the median of Sand
 7 Hill Road). The City did not demand that these applicants submit anywhere near detail requested of
 8 Zeleny—much less content-based information about their productions and participants.

9 Zeleny declined to provide the irrelevant, content-based information the City demanded,
 10 which was not required by the application itself. He urged the City to move forward. Flegel Decl.,
 11 Exs. M, N, P; Zeleny Decl., Exs. 11, 13. The City Attorney’s office declined to proceed with the
 12 application, which it did not “consider[] complete.” Flegel Decl., Ex. Q.

13 **G. The City Refused to Disclose Time, Place, or Manner Standards.**

14 At all times, Zeleny made clear that he was willing to comply with all reasonable time,
 15 place, and manner requirements. He repeatedly asked the City to simply tell him what they were
 16 and what standard he had to meet. Zeleny Decl. ¶ 37 & Exs. 7, 8 at pp. 24, 46; *id.*, Ex. 11, 13. The
 17 City refused. *See Robison Supp. Decl.*, Ex. 2 at 447-48. Instead, it denied or refused to process his
 18 applications without specifying any content-neutral guidelines. Zeleny Decl., Ex. 8 at pp. 20-21.

19 **III. ARGUMENT**

20 **A. The City’s Permit Processes Are Unconstitutional Under *Epona*.**

21 As detailed in Zeleny’s Motion, the City’s processes for SEPs and film permits fail under
 22 *Epona*. The City offers no argument to justify its policies and fails even to cite *Epona*.

23 **1. Permitting Requirements are Closely Scrutinized.**

24 Permitting requirements applied to First Amendment activity are prior restraints. *Epona*,
 25 876 F.3d at 1221; *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097, 1100 (9th Cir.1998).
 26 Prior restraints are “the most serious and least tolerable infringement” on First Amendment rights.
 27 *Grossman v. City of Portland*, 33 F.3d 1200, 1204 (9th Cir.1994) (citation omitted).

28 “While prior restraints are not unconstitutional *per se*, any system of prior restraint comes to

1 this Court bearing a heavy presumption against its constitutional validity.” *FW/PBS, Inc. v. City of*
 2 *Dallas*, 493 U.S. 215, 225 (1990) (quotation marks and alterations omitted).

3 It is settled … that an ordinance which makes the peaceful enjoyment of
 4 freedoms which the Constitution guarantees contingent upon the uncontrolled
 5 will of an official—as by requiring a permit or license which may be granted
 6 or withheld in the discretion of such official—is an unconstitutional
 7 censorship.

8 *Id.* (quoting *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969); alterations omitted).

9 The grant or denial of a permit must be governed by “narrow, objective and definite
 10 standards.” *Epona*, 876 F.3d at 1222 (quoting *Shuttlesworth*). The standards “must be sufficiently
 11 specific and objective” to limit discretion. *Id.* (quoting *Desert Outdoor Advert., Inc. v. City of Moreno Valley*, 103 F.3d 814, 819 (9th Cir. 1996)). A scheme that grants an “impermissible degree
 12 of discretion” is unconstitutional. *Id.*

13 The process must also have procedural safeguards, requiring prompt and decisive action.
 14 “[A] prior restraint that fails to place limits on the time within which the decisionmaker must issue
 15 the license is impermissible.” *FW/PBS, Inc.*, 493 U.S. at 226 (citing *Freedman v. State of Md.*, 380
 16 U.S. 51, 59 (1965)). The government must “within a *specified, brief* period, either issue a license or
 17 go to court.” *Freedman*, 380 U.S. at 59; see also *Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781, 802
 18 (1988) (invalidating statute without explicit time for limit) (emphasis added).

19 2. The SEP Process Is Unconstitutional Under *Epona*

20 a. The SEP Process Has No Objective Standards.

21 The grant or denial by the City of an SEP is “at the discretion of the [SEP committee].”
 22 Robinson Decl., Ex. R. at MP-1820. The City has no *objective* criteria.

23 As an initial matter City has discretion to decide if an event is “special” enough to warrant a
 24 permit even where written policy covers it. Robinson Supp. Decl., Ex. 1 at 20-21; *id.*, Ex. 2 at 371-
 25 72. Deciding if an event is “special” or a “community-type” event is the opposite of objective.

26 Even if the City decides that an event qualifies, it has no objective standard to determine
 27 whether to issue a permit. If one criterion “confers an impermissible degree of discretion, the
 28 specificity of a separate condition will not save the scheme.” *Epona*, 875 F.3d at 1224. The FAQ
 lists “abstract,” “ambiguous and subjective” factors of the type that courts have invalidated—

e.g., “past practices/experiences,” “intended use” (without explanation of what uses are allowed), and “community impact.” *See id.* (reversing summary judgment where criteria included “compatible with existing and potential … uses,” and not “impair[ing] the utility of neighboring property”); *Moreno Valley*, 103 F.3d at 818 (reversing where criteria included “harmful to the community’s health, welfare, or ‘aesthetic quality’”). These fuzzy factors do not limit discretion.

Those criteria that appear somewhat objective have no guiding standards. The City lists “size,” “scale,” and “location,” but has no guidelines for defining an appropriate size or location, or what impact on City resources is excessive. Robinson Supp. Decl., Ex. 2 at 241-247. No evidence of impact is required and City staff are not required to make factual findings. *See generally* Robinson Decl., Ex. R; Zeleny Decl., Ex. 9 at p. 12; *Moreno Valley*, 103 F.3d at 818 (striking down ordinance allowing officials to “deny a permit without offering any evidence to support the conclusion”); *Epona*, 876 F.3d at 1224 (invalidating due to “lack of a requirement that permitting officials support their decision with objective evidence”); *Weaver v. Montebello*, 370 F.Supp.3d 1130, 1136 (C.D. Cal. 2019) (issuing injunction where ordinance did not require factual findings).

Worse, as the FAQ makes clear, the list of published criteria is non-exhaustive. The City can and does consider new factors as it sees fit, including content-based factors, depending on the application. Robinson Supp. Decl., Ex. 2 at 426-27. A process that allows officials to add new criteria case-by-case—especially content-based ones—necessarily violates *Epona*.

Finally, the City's witnesses have been clear that there is no set timeframe. Robinson Supp. Decl., Ex. 2 at 247, Ex. 33 at 75, 80.

b. The SEP Process Covers First Amendment Expression

Rather than defend its SEP process on the merits, the City claims that the SEP process does not “substantially reach or regulate constitutional activity.” Memo. at p. 19. This is absurd.

In the very next sentence, the City acknowledges that the SEP process applies to core First Amendment activity, *i.e.* “concerts,” and “movie nights.” Mot. at p. 19. Elsewhere, it adds “small parades and fundraisers” to the list. *Id.* at pp. 3. The process also applies to weddings. Robinson Supp. Decl., Ex. 2 at 456. All of these are core forms of protected expression. See *Epona* (weddings); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 568-69

1 (parades); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981) (“motion pictures ... and live
2 entertainment, such as musical ... works”); *Riley*, 487 U.S. at 788-89 (1988) (fundraisers).

3 The Ninth Circuit rejected a similar argument in *Epona*, which addressed a conditional use
4 permit process. Under *Epona*, a permitting scheme is subject to facial challenge where it has a
5 “close enough nexus to expression, or to conduct commonly associated with expression” to pose a
6 real threat that “protected speech or conduct will be suppressed,” including through self-censorship.
7 876 F.3d at 1221 (*citing Cty. of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 759 (1988)).
8 Even where a permitting scheme does not directly apply to expression, it can be challenged where it
9 “vest[s] broad discretion in permitting officials.” *Id.*

10 The SEP policy plainly has a “nexus” to First Amendment Activity. The policy is extremely
11 broad, covering any event that draws a crowd, exceeds the noise ordinance, or requires use of streets
12 or sidewalks. This necessarily encompasses all manner of First Amendment activity, including
13 Zeleny’s events, and the examples the City gives. It also vests improper discretion in City officials.

14 **3. The City’s Film Permit Process Is Unconstitutional Under *Epona***

15 **a. The Film Permit Process Is “Completely Discretionary” and
16 Lacks any Time Limits.**

17 As the City admitted during the administrative process, the grant or denial of film permits is
18 “completely discretionary”. Decl. of Todd Master [Dkt. 160-6], Ex. E at p. 44.

19 There are no objective criteria—or any criteria—governing that discretion. No criteria for
20 grant or denial appear in the flyer or the application form, which merely spell out logistics such as
21 insurance requirements, business licensing, and indemnification. Robinson Decl. Ex. U; Zeleny
22 Decl., Ex. 12. The City admitted in discovery that there are no other written or unwritten policies.
23 Robinson Supp. Decl., Ex. 2 at 481-82. Staff consider whatever factors they deem appropriate. *Id.*
24 at 483-487. Even if an applicant complied with all of the written requirements, the City could still
25 deny an application. *Id.* A policy that fails to state any objective standard cannot pass muster. See
26 *Niemotko v. State of Md.*, 340 U.S. 268, 272 (invalidating statute: “no standards appear anywhere”).

27 Moreover, the City did not limit itself to time, place and manner factors. As Bertini stated:

28 Q: I mean, was this a factor – the exact image or images, was this a

1 factor that was part of the City's policy before Mr. Zeleny applied for
 2 a film permit, or was it a factor that was decided upon based on the
 application he submitted?

3 A: ***This was a factor because of what Mr. Zeleny stated he wanted to***
 4 ***do....***

5 *Id.*, Ex. 2 at 521. *Epona* does not allow officials to make up whatever factors they see fit.

6 Defendants' citation of *Thomas v. Chicago Park District*, 534 U.S. 316 (2002) makes
 7 Zeleny's point. In contrast to the City's policy—or lack thereof—the Chicago Park District had an
 8 objective, multi-element test, including clear standards such as scheduling conflicts, prior damage to
 park facilities, and non-compliance with specific use categories. Chicago had objective criteria
 9 limited to time, place, and manner. Here, the City has “complete discretion” and no official criteria.

10 Finally, the City has admitted that there is no fixed time period for permitting decisions.
 11 Case in point, the City has been sitting on one application or another from Zeleny ***since 2015***. This
 12 renders the policy unconstitutional *per se*. *FW/PBS, Inc.*, 493 U.S. at 226.

13 **b. The Construction Permitting Process Does Not Govern Film**
 14 **Permits and Fails Under *Epona* In Any Event.**

15 The City raises a last-minute theory for the first time in its Motion, that film permits are
 16 actually governed by its construction encroachment process, citing Menlo Park Municipal Code §
 17 13.18, *et seq.* This theory is disingenuous, has been waived, and on its face does not apply.

18 The City's new theory is contrary to all of its discovery responses. Zeleny specifically
 19 asked it to identify any “rule, regulation, ***ordinance***, guideline, or guidance … governing
 20 applications for permits of the types that Zeleny has sought,” including a film permit. Robinson
 21 Supp. Decl. ¶ 10. The City, which has engaged in repeat discovery abuse, *see, e.g.*, Discovery
 22 Order [Dkt. No. 117], Discovery Order [Dkt. No. 157], answered three times—in February 2019,
 23 March 2020, and May 2020. It never mentioned Municipal Code § 13.18, *et seq.* Robinson Supp.
 24 Decl., Ex. 8 at pp. 6-7, Ex. 9 at 11-12, Ex. 10 at 9-10. Nor did the City produce these Code
 25 sections. It only produced the sections governing firearms. Robinson Supp. Decl. ¶ 15.

26 The City's witnesses also contradicted this new theory. Bertini, the Rule 30(b)(6) designee,
 27 and Nicolas Flegel, the City's declarant, testified that they were not aware of any applicable
 28 Municipal Code sections. Robinson Supp. Decl., Ex. 1 at 240; *see also id.*, Ex. 13 (Rule 30(b)(6)

1 topics); *id.*, Ex. 4 at 76 (“Any specific sections of those codes that you’re aware of that staff would
 2 be looking at? … A. No.”). Both testified that the two-page flyer and application form were the
 3 only policies. *Id.*, Ex. 2 at 481-82; *see also id.*, Ex. 4 at 79, 102.

4 The City also waived this new argument. Witnesses are not allowed to contradict their
 5 deposition testimony by declaration. *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir.
 6 1991). A party “cannot present a theory of facts that differs from that articulated” by its Rule
 7 30(b)(6) designee. *Snapp v. United Transp. Union*, 889 F.3d 1088, 1103 (9th Cir. 2018). The
 8 City’s failure to present this argument prior to summary judgment is highly prejudicial because it
 9 precluded any examination of these witnesses on the Municipal Code. *See* Robinson Supp. Decl. ¶
 10 16. *See Cambridge Elec. Corp. v. MGA Elecs., Inc.*, 227 F.R.D. 313, 323-24 (C.D. Cal. 2004).

11 The argument also fails on the merits. The encroachment process on its face applies to
 12 construction, not film permits. The Municipal Code nowhere mentions “filming,” “film,” or “film
 13 permits.” The “Regulations” section of the code, which the City now claims is its governing
 14 standard, applies to “[t]he construction, operation, maintenance, and repair of *facilities*.²”
 15 Municipal Code § 13.18.110. It lists various construction standards—*e.g.*, “hours of construction
 16 activities,” “graffiti-resistant finish material,” and landscaping—none of which apply to filming.

17 By contrast, the film permitting guidelines contain different requirements, specific to
 18 filming. The City treats these as separate “film permit requirements,” not encroachment
 19 requirements. *See, e.g.*, Flegel Decl., Ex. F at p. 2 (referring to the “film permit application process”
 20 and “film permit requirements”); *see also* Robinson Supp. Decl., Ex. 4. At 93; Ex. 11 at MP-1801.
 21 They require a “description of the nature of the filming … a list of all equipment involved in the
 22 filming … the number of cast and crew members” and “an indication of any special needs.”
 23 Robinson Decl., Ex. U. None of these requirements appears in the encroachment process.

24 Nor did the City apply the routine encroachment process to Zeleny. The only requirements
 25

26 ² Facility” means “pipe, pipeline, tube, main, service, trap, vent, vault, manhole, meter, gauge, regulator,
 27 valve, conduit, wire, tower, pole, pole line, anchor, cable, junction box, transformer or any other material,
 structure or object of any kind or character, whether enumerated herein or not, which is or may be lawfully
 constructed, left, placed or maintained in, upon, along, across, under or over any public right-of-way.”

1 for an encroachment application are:

2 the name of the applicant; the name, address, telephone number, and business
 3 information for the owner or contractor on behalf of whom the applicant is
 4 submitting the application; the location and a description of the work to be
 done; and the approximate time which will be required to complete such
 work.

5 The City may also require a map. *Id.* The City, however, demanded a host of information from
 6 Zeleny nowhere on this list, related directly to filming—*e.g.*, Zeleny’s cast and crew. The City also
 7 considered vague substantive factors such as “public safety” and traffic impact not listed in the
 8 encroachment regulations. Mr. Flegel testified that film permits are decided upon by a committee
 9 of various departments, rather than the Director of Public Works, which handles encroachment
 10 permits. Robinson Supp. Decl., Ex. 4 at 59; compare Municipal Code §§ 13.18.020(a),
 11 13.18.110(a). The City’s much-belated invocation of the encroachment process is simply phony.

12 Even if the City could graft this construction standard onto film permits for litigation
 13 purposes, it still would not satisfy *Epona*. The encroachment process has no objective or
 14 definite criteria. The Director of Public Works has unbridled discretion to impose any
 15 “directives or additional conditions” he chooses. *Id.* § 13.18.110(a). The process remains
 16 “completely discretionary.” There is also no specified timeline or requirement to provide
 17 reasons for the denial, other than in the case of cable television franchises. *See Id.* § 13.18.040.

18 **4. The Permitting Processes Were Unconstitutional as Applied.**

19 **a. The City Ignored Its Own SEP Process.**

20 The City did not follow its SEP process, but made up a new one specifically for Zeleny’s
 21 application. Robinson Supp. Decl., Ex. 3 at 149-150 (“Is there a procedure for processing an
 22 application the way you decided to do with Mr. Zeleny’s? A. Not that I recall...”).

23 Bertini and/or the City Attorney decided his application without ever submitting it to the
 24 SEP committee. They did so while Bertini was working with NEA. *See* Robinson Decl., Ex. W;
 25 Robinson Supp. Decl., Ex. 2 at 381, Ex. 3 at 138. This had never been done before in the City’s
 26 history. Robinson Supp. Decl., Ex. 1 at 51. They decided the application based on factors outside
 27 City policy, including the now-retracted theory that Zeleny’s event was not a “special event.”
 28 Zeleny Decl., Ex. 8 at p. 21.

At no point did the City offer any evidence or make any findings on the criteria listed in its policy, or any other “time, place, and manner” criteria. It denied the application based on a shifting series of excuses not part of official policy and without evidence of impact. *See Citizens for Clean Gov’t v. City of San Diego*, 474 F.3d 647, 653-54 (9th Cir. 2009) (courts have “never accepted mere conjecture as adequate to carry a First Amendment burden,” and do not accept “hypotheticals and vague allusions to practical experience”). The City repeatedly denied Zeleny’s application because it determined, *in its unbridled discretion*, that his event did not qualify as “special,” and the illogical argument—unrelated to its stated policy—that “open carry” without a permit is illegal.

Although the City now claims that it had a number of questions about Zeleny’s event, it failed to follow its own interactive process. *See* Robinson Decl., Ex. U at p. 1; Robinson Supp. Decl., Ex. 2 at 376, Ex. 3 at 42, 78-79, 120-121. It did not set up a meeting with Zeleny, allegedly for “Zeleny’s convenience”—instead, denying his application so that he had to attend a number of in-person hearings. Robinson Supp. Decl., Ex. 1 at 77, 78; *id.*, Ex. 3 at 92. Zeleny’s multiple calls to the City to follow up went unanswered and unreturned. Zeleny Decl. ¶ 38.

Finally, it took the City over two years to process Zeleny’s SEP application.

b. The City Failed to Follow Its Published Film Permit Process.

Once again, Bertini and the City Attorney’s Office intercepted and took over Zeleny’s permit application. Robinson Decl., Ex. AA, BB. At the behest of the MPPD, the City Attorney then peppered Zeleny with a host of content-based questions, wholly unrelated to the City’s minimal “policies” governing film permits. Zeleny Decl., Exs. 11, 13. When Zeleny refused to answer any more irrelevant, content-based questions, the City refused to process his application. His application has now been “pending” for more than three years. This is not remotely compliant with the process required by the First Amendment.

B. The City Defendants’ Ripeness and Mootness Defenses Fail

1. The City Defendants’ Ripeness Argument Defies Established Law.

a. The City Cannot Avoid Review by Shelving the Application.

The City audaciously claims that Zeleny’s as applied challenge to the film permitting process—but not his facial challenge—is unripe because the City has failed to process Zeleny’s

1 application since 2017. *See* Robinson Supp. Decl., Ex. 1 at 124, 125 (acknowledging that
 2 application itself is complete). This argument is directly contrary to precedent.

3 The City cannot avoid judicial review by asserting a “pocket veto” on permit applications
 4 and shelving them indefinitely. An indefinitely delay is the same thing as an arbitrary denial.
 5 *FW/PBS, Inc.*, 493 U.S. at 226; *Riley*, 487 U.S. at 802 (“delay compels the speaker’s silence”).

6 The City’s efforts to blame Zeleny are irrelevant and inaccurate. It was up to the City to
 7 process the application—not Zeleny. Zeleny explicitly declined to provide further, content-based
 8 information not relevant to the City’s stated policy. *See* Robinson Supp. Decl., Ex. 2 at 528-529
 9 (“So this request by Mr. Flegel is outside of the written and unwritten policy of the City of Menlo
 10 Park; true? A. Yes”). He did so after the City had already delayed his SEP application for two
 11 years; recommended that he apply for a film permit and then delayed that process by two months;
 12 and refused to tell him what the standard was for permits. As would any reasonable person, Zeleny
 13 simply urged the City to process his application as filed. *See* Zeleny Decl., Ex. 11 (“As we say in
 14 Hollywood, let’s cut to the chase”); Ex. 13.

15 The City was required to promptly “issue a license or go to court.” *Freedman*, 380 U.S. at
 16 59. If the City believed that Zeleny’s application was “incomplete,” it was up to the City to deny on
 17 that basis and take its chances on judicial review. It was not allowed to just do nothing.

18 **b. Zeleny Was Not Required to Exhaust a Defective Process.**

19 As an initial matter, as the City acknowledges, Zeleny’s facial challenge is not subject to its
 20 ripeness argument “because a facial challenge by its nature does not involve a decision applying the
 21 statute.” *Hacienda Valley Mobile Estates v. Cty. of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003).

22 The City fails to mention that the same analysis applies to a challenge to a defective
 23 administrative process, rather than a specific decision. *Gibson v. Berryhill*, 411 U.S. 564, 575
 24 (1973). In such cases, the question of whether the administrative process was adequate, “is for all
 25 practical purposes identical with the merits” and no exhaustion is required. *Id.* A plaintiff is not
 26 required to wade through a constitutionally-deficient process for years to challenge it. *Id.*; *see also*
 27 *Laub v. U.S. Dept. of Interior*, 342 F.3d 1080, 1089-90 (9th Cir. 2003) (noting that a procedural
 28 challenge is ripe as soon as the failure to observe proper procedures occurs).

1 It is settled law that a person may challenge a defective permit scheme, “without the
 2 necessity of first applying for, and being denied, a license.” *Cty. of Lakewood v. Plain Dealer Pub.*
 3 *Co.*, 486 U.S. 750, 755-56 (1988). Due to the prospect of self-censorship, “the prior restraint of a
 4 licensing provision coupled with unbridled discretion itself amounts to an actual injury” even if the
 5 plaintiff does not seek a permit. *Prime Media, Inc. v. Cty. of Brentwood*, 485 F.3d 343, 351 (6th
 6 Cir. 2007). Zeleny has been subject to concrete harm by being delayed for years in engaging in
 7 protected expression. *See also Carpinteria Valley Farms, Ltd. v. Cnty. of Santa Barbara*, 344 F.3d
 8 822, 830-31 (9th Cir. 2003) (“[e]ven if the County relented today and issued all of the permits ... he
 9 still would have been injured by the treatment he allegedly received”); *Harris v. Cnty. of Riverside*,
 10 904 F.2d 497, 501 (9th Cir. 1990) (noting that even absent an “authoritative determination,”
 11 depriving plaintiff of use of land during permit process amounted to “actual, concrete injur[y]”).

12 A plaintiff is not required to submit to “an unreasonable or indefinite timeframe for
 13 administrative action.” *McCarthy v. Madigan*, 503 U.S. 140, 147 (1992) (citing cases) (superseded
 14 by statute on other grounds, see 42 U.S.C. § 1997e(a)); *Smith v. Ill. Bell Tel. Co.*, 270 U.S. 587,
 15 591-92 (1926) (noting a plaintiff “is not required to indefinitely await a decision”). “The lack of a
 16 reasonable time limit in the ... administrative [process] renders it inadequate” as a matter of law.
 17 *Coit Independence Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 587 (1989).

18 The City’s cases are wildly off-point. *Manufactured Home Communities, Inc. v. City of San*
 19 *Jose*, 420 F.3d 1022 (9th Cir. 2005) and *Guatay Christian Fellowship v. Cnty. of San Diego*, 670
 20 F.3d 957 (9th Cir. 2011), apply the *Williamson County* standard for ripeness, which is (a) a
 21 heightened standard applicable to land use and takings; and (b) has been overruled. *See Mi Pueblo*
 22 *San Jose, Inc. v. City of Oakland*, No. 06-4094, 2006 WL 2850016, at *6 (N.D. Cal. Oct. 4, 2006)
 23 (“both parties are mistaken to focus on *Williamson County*”); *Knick v. Township of Scott, Penn.*, __
 24 U.S. __, 139 S.Ct. 2162 (2019). In First Amendment cases, “the Supreme Court has dispensed with
 25 rigid standing requirements,” including formal ripeness. *Cal. Pro-Life Council v. Getman*, 328 F.3d
 26 1088, 1094 (9th Cir. 2003). Zeleny’s inability to put on his events without threat of prosecution
 27 satisfies ripeness in this context. *See* Zeleny Supp. Decl. ¶ 7; *Porter v. Gore*, 354 F.Supp.3d 1162,
 28 1175 (S.D. Cal. 2018) (“self-censorship is enough to overcome a ripeness challenge”).

1 The City's other cases are equally distinguishable. *Thomas v. Anchorage Equal Rights*
 2 *Comm'n*, 220 F.3d 1134 (9th Cir. 2000), involved a criminal statute rather than a permitting
 3 requirement. Because there was no specific threat of enforcement and no clear plan to violate the
 4 statute, the plaintiff lacked standing. *Id.* Where the regulation governs affirmative expression, a
 5 preemptive challenge is allowed. *Arizona Right to Life PAC v. Bayless*, 320 F.3d 1002, 1006 (2003)
 6 ("hold your tongue and challenge now" approach) (citing cases). Finally, *Abbott Laboratories v.*
 7 *Gardner*, 387 U.S. 136 (1967) involved administrative rulemaking, and held that final rules were
 8 required before they could be challenged. This obvious point has no application here.

9 **2. The City's Mootness Argument Misses the Point.**

10 The City's supposed lack of ownership of the median was not raised in the permitting
 11 process or the first two and a half years of this case. This new evasion fails for several reasons.

12 **a. The City's Asserted Lack of Ownership Is Irrelevant.**

13 As an initial matter, the City's purported lack of ownership is irrelevant to whether the
 14 permitting process is constitutional. Even if the City could have denied Zeleny's application in
 15 2015, that does not speak to whether the *process itself* was constitutional. The City cannot force
 16 Zeleny to go through the futile permit process a third time based on a theory that it never raised.

17 The City Defendants bear a "heavy" burden. *Nw. Env't Def. Ctr. v. Gordon*, 849 F.2d 1241,
 18 1244-45 (9th Cir. 1988). It must be truly "impossible for the court to grant effectual relief
 19 whatever." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). The City Defendants must show that
 20 Zeleny cannot be given "any effective relief"—not merely the "precise relief sought" in his
 21 complaint. *Nw. Environmental*, 849 F.2d at 1244-45 (noting that court could expand injunction to
 22 give effective relief); *see also Garcia v. Lawn*, 805 F.2d 1400, 1402-03 (9th Cir. 1986).

23 Zeleny seeks effective relief regardless of who owns the median. He seeks a declaration that
 24 the City's permitting process is unconstitutional, and for an injunction prohibiting Defendants from
 25 enforcing the permitting process and requiring them to issue him a permit. SAC at p. 42 ¶ F.³ His

26 ³ Zeleny is also entitled to nominal damages as a matter of law under 42 U.S.C. § 1983. *Hazel v. Crofoot*,
 27 727 F.3d 988, 991-92 (9th Cir. 2013); *see also Bernhardt v. Cnty of Los Angeles*, 279 F.3d 862, 872 (9th Cir.
 28 2002) (nominal damages "will prevent dismissal for mootness").

1 request is not limited to an injunction at the median strip on Sand Hill Road.

2 Zeleny made clear to the City that he would relocate if needed. Zeleny Supp. Decl. ¶ 8;
 3 Master Decl., Ex. F at 25:8-11 (“If the median strip is not acceptable to the City, I would be happy
 4 to move to the side of the road”). The City’s permitting process is defective and applies regardless
 5 of where he seeks to stage his protest events—on the median, on the sidewalk or roadside, or
 6 anywhere else in Menlo Park. By invalidating the process and ordering the City to issue a permit,
 7 the Court can grant effective relief.

8 **b. The City Waived Its New Theory.**

9 As the City acknowledges, it failed to raise its alleged lack of ownership during the permit
 10 process. Mot. at p. 9. “A party forfeits arguments that are not raised during the administrative
 11 process.” *See Lands Council v. McNair*, 629 F.3d 1070, 1076 (9th Cir. 2010). It was up to the City
 12 to raise this issue so that Zeleny could address it, *e.g.*, by offering to relocate. It is too late now.

13 The City also failed to raise this issue in its pleadings. It alleged that it requires “any and all
 14 person wishing to film within *the public right-of-way*” to have a permit. Answer to Second Am.
 15 Compl. [Dkt. No. 101] ¶ 4. The City has not sought leave to amend.

16 The City first raised this theory in supplemental interrogatory responses more than *two years*
 17 into this case, very late in discovery. Robinson Supp. Decl. ¶¶ 11-13 & Ex. 8 at 2-3, Ex. 9 at 3, 6-7.
 18 It waited until three days after the deposition of its declarant, Mr. Flegel. *Id.* ¶ 12. It refused to
 19 allow its 30(b)(6) designee to testify about the theory, asserting privilege. *Id.*, Ex. 2 at 261-63.

20 This tactic was highly prejudicial. Robinson Supp. Decl. ¶ 13. A party may not raise new
 21 defenses at summary judgment where it is prejudicial. *Magana v. Com. of N. Mariana Islands*, 107
 22 F.3d 1436, 1446 (9th Cir. 1997). By waiting until the end of discovery, the City precluded Zeleny
 23 from any effective examination. It is also improperly using the privilege as a “sword and shield,”
 24 relying on Mr. Flegel as the basis for this theory, while refusing to allow any testimony about
 25 discussions with him. *See Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham,*
 26 *Inc.*, 259 F.3d 1186, 1197 (9th Cir. 2001).

27 **c. The City’s New Theory Fails on the Merits.**

28 In any case, the theory fails to establish as a matter of law that Zeleny’s claims are moot.

1 Regardless of whether Caltrans owned the median and its authorization were needed for an event,
 2 the City's authorization was also required—as the City argues elsewhere. Mot. at p. 17.

3 Regardless of who owned the median, Zeleny would still be subject to arrest and prosecution
 4 by Menlo Park authorities if he staged his event on it. The median is within City limits and the City
 5 has criminal jurisdiction. Robinson Sup. Decl., Ex. 2 at 263-65. The MPPD still could and would
 6 arrest Zeleny if he staged his events without a permit. *See id.*; Cal. Pen. Code § 830.1(a)(1); *People*
 7 *v. Martin* (1966) 225 Cal.App.2d 91, 93-94. The City has “plenary” police power within its limits.
 8 See Cal. Const., Art. 11, § 7; *Sierra Club v. Napa Cnty.* (2012) 205 Cal.App.4th 162, 172.

9 California Streets & Highways Code § 90 does not address this issue. It relates to the
 10 design, construction, and maintenance of state highways. It does not purport to revoke the City’s
 11 “plenary” authority to enforce criminal laws within the city limits.

12 More fundamentally, the City has failed to submit any *admissible* evidence that Caltrans
 13 “owns” the median. It has not presented any evidence of ownership—*e.g.*, a deed, dedication, or
 14 parcel map. Its only evidence is a smattering of Caltrans contracts and maps, shoved in front of the
 15 Court without analysis. Mr. Flegel is not competent to authenticate them, much less to offer
 16 opinion testimony on what they mean. *See Evidentiary Objections.*

17 The records that the City does submit are ambiguous and insufficient to carry the City’s
 18 “heavy” burden as a matter of law. They tend to show the opposite of what the City claims – *i.e.*,
 19 that the City is responsible for permits. They designate the median as a “r[ight] of way area
 20 ***maintained by City.***” Flegel Decl., Ex. C at MP-6667. Permitting is deemed a maintenance
 21 function. *Id.* at MP-6668, 6669. Further, the contracts state that the City will issue permits, except
 22 for utility lines, driveways, and similar “major encroachments” inapplicable here. *Id.* at MP-6664.

23 Finally, even if the City were right on interpretation, its approval would still be required.
 24 Streets & Highways Code § 682.5(a) provides that Caltrans will not issue a permit within city limits
 25 without “an acknowledgement by the city.” An “acknowledgement” means “issuance by a city ...
 26 of a ***special event permit*** ... or letter of permission authorizing the special event.” *Id.*, subd. (c).

27 **C. The City’s “Time, Place and Manner Reasons” Are Irrelevant.**

28 The City misses the point by arguing that it has legitimate “time, place, and manner reasons”

1 for denying Zeleny's applications. The point of *Epona* and similar cases is that a City can always
 2 come up with plausible justifications in hindsight. *See Cty. of Lakewood*, 486 U.S. at 758 ("*post*
 3 *hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too
 4 easy"). The City was required to have a *sufficient process* at the outset and to tell Zeleny up front
 5 what its standards were. The City failed these requirements.

6 **1. The Denial Was Content-Based.**

7 Content-based restrictions are "presumptively unconstitutional," *Reed v. Town of Gilbert*,
 8 *Ariz.*, 576 U.S. 155, 163 (2015) (citation omitted), and "almost always violate the First
 9 Amendment." *Dish Network Corp. v. FCC*, 653 F.3d 771, 778 (9th Cir. 2011). In order to be
 10 content neutral, the decision must be made "without reference" to content. *Ward*, 491 U.S. at 791

11 The City's decision was not made "without reference" to content. *See, e.g., Kurland v. Cty.*
 12 *of Providence*, 2020 WL 5821091, at *11 (D.R.I. Sept. 30, 2020) (denying summary judgment
 13 based on factual question as to whether decision was content based). While the City insists that its
 14 decisions were content-neutral, there is abundant evidence to the contrary—particularly in light of
 15 the City's history with Zeleny. *See* Robinson Decl., Exs. I, J, K, and L.

16 The City Manager explicitly listed "obscenity laws" as a basis to deny Zeleny's SEP, despite
 17 making no finding that Zeleny's content was obscene. Zeleny Decl., Ex. 8 at p. 11. Bertini made
 18 clear in multiple hearings that he considered Zeleny's content "important, salient information".
 19 Robinson Supp. Decl., Ex. 2 at 476. He made sure to include an image of one of Zeleny's
 20 cartoons, depicting sexual activity, in his presentation. Robinson Decl., Ex. CC at MP-1199. The
 21 City also repeatedly demanded content-based information. *See, e.g., Zeleny Decl.*, Exs. 11, 13.

22 Moreover, throughout the permitting process, Bertini was working directly with the subject
 23 of Zeleny's protests, NEA, to develop a "combined response." Robinson Decl., Ex. W. He told
 24 NEA that the City intended to deny the application *months* before he even told Zeleny. *Id.*

25 **2. Heightened Scrutiny Applies Because Medians Are Public Fora.**

26 The City is wrong in arguing—without authority—that a median is not a traditional public
 27 forum. Courts have consistently held the opposite. *See, e.g., Satawa v. Macomb Cnty. Road*
 28 *Comm'n*, 689 F.3d 506, 520-22 (6th Cir. 2012); *Cutting v. City of Portland*, 802 F.3d 79, 83 (1st

1 Cir. 2015); *McGraw v. Oklahoma City*, 973 F.3d 1057, 1069-70 (10th Cir. 2020); *Reynolds v.*
 2 *Middleton*, 779 F.3d 222, 225 (4th Cir. 2015) (“no question that … streets and medians qualify”).

3 Zeleny also proposed moving his events to the sidewalk or the roadside, which are also
 4 quintessential public fora. *Comite de Jornaleros de Redondo Beach v. Cty. of Redondo Beach*, 657
 5 F.3d 936, 945 (9th Cir. 2011). The City refused to allow Zeleny’s protests on any of these sites.

6 **3. The City Cannot Justify an Outright Ban on Zeleny’s Events.**

7 In traditional public fora, “the rights of the state to limit expressive activity are sharply
 8 circumscribed.” *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 45 (1983).
 9 Restrictions on speech in public fora, particularly prior restraints, “are presumptively invalid.”
 10 *Long Beach Area Peace Network*, 574 F.3d 1011, 1021 (9th Cir. 2009).

11 Restrictions in a public forum must be (1) “justified without reference to [] content”; (2) be
 12 “narrowly tailored to a significant” interest; and (3) “leave open ample alternative channels for
 13 communication.” *Ward*, 491 U.S. 781. “The failure to satisfy any single prong … invalidates the
 14 requirement.” *ACLU of Nev. v. Cty. of Las Vegas*, 466 F.3d 784, 792 (9th Cir. 1984).

15 “The burden of justification is demanding and it rests entirely on the [City].” *United States*
 16 *v. Virginia*, 518 U.S. 515, 533 (1996). The City must “demonstrate that the recited harms are real,
 17 not merely conjectural, and that the regulation will in fact alleviate those harms in a direct and
 18 material way.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994). Any decision must be
 19 “***based on substantial evidence.***” *Id.* (emphasis added); *see also Cty. of Los Angeles v. Alameda*

20 *Books, Inc.*

21 , 535 U.S. 425, 428 (2002) (plurality).

21 **a. The City’s “Open Carry Is Illegal” Excuse Is Pretextual.**

22 The City’s current rationale is that “California statutory law prohibit[s] the open carry of
 23 firearms.” Mot. at 14. In other words, the City refuses to give Zeleny the permit he needs to carry
 24 legally because *without that permit* it would be illegal. This circular argument is absurd. It is not a
 25 reason for denying a permit; it’s why Zeleny needs one. The City cannot “get away with shoddy …
 26 reasoning” when it comes to the First Amendment. *Alameda Books*, 535 U.S. at 426.

27 The City’s argument that Zeleny’s production does not (really) qualify as a video production
 28 or entertainment event is flatly wrong and amounts to an unconstitutional, content-based restriction.

1 As a factual matter, Zeleny has been making installments of a documentary about NEA's support of
 2 Min Zhu, a morally unfit executive, since 2009. He intends to continue.

3 It is also not up to the City to decide whether Zeleny's events truly qualify as entertainment
 4 or video production. Distinguishing different forms of entertainment or videos is the height of
 5 impermissible, content-based restrictions. The City may not distinguish between Zeleny's one-man
 6 production and a major blockbuster. *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972) ("liberty of the
 7 press is the right of the lonely pamphleteer ... just as much as the large metropolitan publisher").
 8 "[T]he legislature is constitutionally disqualified from dictating the subjects about which persons
 9 may speak and the speakers who may address a public issue." *First Nat'l Bank of Boston v. Bellotti*,
 10 435 U.S. 765, 784 (1978); *see also Citizens United*, 558 U.S. at 340.

11 **b. There Is No Evidence of the City's Public Safety Grounds.**

12 The City offered no evidence in the permitting process, and submits none now, of any actual
 13 public-safety impact. The record is devoid of substantive evidence, *e.g.*, a traffic survey, analysis of
 14 accident history, human factor studies, or the like. As it did in the permitting process, the City
 15 merely presents a description of the event and a blanket conclusion that it poses safety issues.

16 The First Amendment does not allow this kind of conclusory decision-making. Conjecture
 17 can never "carry a First Amendment burden." *Citizens for Clean Gov't*, 474 F.3d at 653-54. The
 18 evidence must permit a "reasonable inference" that the prohibited activity will actually cause harm.
 19 *Tollis, Inc. v. San Bernardino Cty.*, 827 F.2d 1329, 1333 (9th Cir. 1987). The City failed to
 20 "demonstrate that the recited harms are real, not merely conjectural." *Turner*, 512 U.S. at 666.

21 The City tries to gloss over its lack of evidence by disparaging Zeleny. The City asks the
 22 Court to assume that Zeleny's events must pose a threat to public safety because Zeleny wants to
 23 incorporate unloaded firearms. This is not how constitutional rights are treated.

24 The City intentionally ignores that Zeleny engaged in similar activities, at the same location,
 25 close to two dozen times without incident. Not only did MPPD officers not perceive a safety risk,
 26 they noted how cooperative Zeleny was. Robinson Decl., Ex. H; *see also* Robinson Supp. Decl.,
 27 Ex. 1 at 56-57; *id.*, Ex. 2 at 293; *see also* Robinson Decl., Ex. C ¶¶ 11-12 (expert declaration
 28 opining that Zeleny "demonstrated exceptional gun safety and knowledge of applicable law").

1 Contrary to the City’s wild speculation, there were no car crashes; no motorists drove “erratically”
 2 in response; no passersby tried to storm Zeleny with guns, to engage him in a shootout, or to run
 3 him down. The events were uneventful, aside from exposing the targets of Zeleny’s protests, to the
 4 consternation of City officials. Zeleny Supp. Decl. ¶ 3.

5 Rank speculation of potential harms is not a basis to ban speech. See *Comite de Jornaleros*,
 6 657 F.3d at 949; *Porter v. Gore*, 354 F. Supp. 3d 1162, 1179 (S.D. Cal. 2018).

7 **c. The City Did Not Leave Open “Ample Alternative Channels”.**

8 Finally, the City cannot establish that it left open “ample alternative channels” when it flatly
 9 prohibited Zeleny’s events. The City refused to address, or even consider, alternatives. Zeleny
 10 repeatedly offered to make any reasonable time, place, and manner adjustments the City proposed.
 11 He urged the City to simply tell him what the requirements were. The City refused while
 12 continuing to deny his application for failure to comply with its ever-shifting and unspecified “time,
 13 place, and manner” limits. All it told him is that his event would not be allowed.

14 The City’s throw-away argument that Zeleny “did not need a permit to conduct lawful
 15 protests,” Memo. at p. 16, is preposterous. If true, all the City had to do was say so. Instead, it
 16 repeatedly and credibly threatened to prosecute Zeleny – after having subjected him to one bogus
 17 criminal prosecution already.

18 The City insists that Zeleny’s protest events are governed by the City’s mandatory
 19 permitting processes—*i.e.*, he needs a film permit to film and an SEP for an event. Flegel Decl.,
 20 Ex. L. The City also asserts that Zeleny must have a permit to comply with state law governing
 21 firearms. If the City’s authorization is required, there must be some mechanism for granting it. The
 22 only mechanism is an SEP or film permit. *Id.*; Robinson Decl., Ex. 1 at 24. The City cannot close
 23 its official processes to Zeleny to prevent him from complying with its own interpretation of state
 24 law. Nor can it require Zeleny to radically change his events—*i.e.*, by giving up his statutory and
 25 constitutional right to bear arms—so that it can avoid a decision. The City cannot force him to trade
 26 one right, *i.e.*, to bear arms, for another, *i.e.*, to protest.

27 **D. Bertini Is Not Entitled to Summary Judgment.**

28 Bertini incorrectly argues that he is entitled to summary judgment on the ground that he no

1 longer works for the City. Zeleny is entitled to declaratory relief and nominal damages,
 2 notwithstanding Bertini's retirement. *Hazel*, 727 F.3d at 991-92. Zeleny is entitled to a judicial
 3 finding that Bertini violated his rights. He is also entitled to attorneys' fees. 42 U.S.C. § 1988.

4 The basis for Zeleny's claims is that Bertini "actively participated" in—and in fact
 5 orchestrated—the City's defective permitting process. Memo. at p. 23. The Second Amended
 6 Complaint details Bertini's direct and active participation for the benefit of NEA. The evidence on
 7 the parties' cross-motions establish Zeleny's allegations as a matter of law. Second Am. Compl. ¶¶
 8 138-172, 176-186; *see also* Robinson Decl., Exs. W, V, AA, BB; Zeleny Decl., Ex. 9 at 6, 8, 9; Ex.
 9 11, Ex. 13; Robinson Supp. Decl., Ex. 1 at 51, 61, 104-06, 136-37, 439, 141-43, Ex. 2 at 256, 371-
 10 72, 450-52, 497-98, 505-06; Ex. 3 at 39-40, 53-55, 154; Ex. 6.

11 A city official is liable under 42 U.S.C. § 1983 if he "does an affirmative act, participates in
 12 another's affirmative act, or omits to perform an act which he is legally required to do that causes
 13 the deprivation" of constitutional rights. *Preschooler II v. Clark Cnty. Sch. Bd. of Trs.*, 478 F.3d
 14 1175, 1183 (9th Cir. 2007) (citation omitted). Here, Bertini (i) intercepted Zeleny's permit
 15 applications and caused them to be denied; (ii) made the decision, with McClure, to deny those
 16 applications; and (iii) urged the City Manager and City Council to affirm the denial on content-
 17 based grounds. Bertini was a driving force behind the deprivation of Zeleny's rights.

18 Finally, Bertini is not entitled to qualified immunity. Qualified immunity applies to claims
 19 for money damages, not to actions for declaratory relief or actions against an official in his official
 20 capacity. *See Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *Ky. V. Graham*, 473 U.S. 159, 166
 21 (1985). Zeleny is not seeking money damages. Moreover, in *Moreno Valley*, 103 F.3d at 821, the
 22 Ninth Circuit held that qualified immunity did not apply to a defective permitting scheme because
 23 "[f]or over 50 years, it has been clearly established that a licensing scheme is impermissible if it
 24 allows officials unfettered discretion."

25 **IV. CONCLUSION**

26 For the foregoing reasons, the City Defendants' motion should be denied, and summary
 27 judgment should be entered in Zeleny's favor on his cross-motion for summary judgment.

28 //

1 Dated: 2/4/2021

Respectfully submitted,

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1 **PROOF OF SERVICE**

2 I hereby certify that on February 4, 2021, I electronically filed the foregoing document
3 using the Court's CM/ECF system. I am informed and believe that the CM/ECF system will
send a notice of electronic filing to the interested parties.

4 s/ Gabrielle Bruckner
5 Gabrielle Bruckner